

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)
W.A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA,)
et al.)
Plaintiffs,)
V.) No. 05-CV-329-GKF-SAJ
TYSON FOODS, INC., et al.,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS

HAD ON JULY 5, 2007

MOTION HEARING

BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge

APPEARANCES:

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For the Defendant Peterson Farms: Mr. A. Scott McDaniel
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1 (APPEARANCES CONTINUED)

2 For the Defendant Mr. Bruce Freeman
3 Simmons Foods: Hall, Estill Hardwick Gable
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6 PROCEEDINGS

7 July 5, 2007

8 THE CLERK: We're here in the matter of the Attorney
9 General, State of Oklahoma, et al. vs. Tyson Foods, Inc., et
10 al. case number 05-CV-329-GKF. Parties please enter their
11 appearance.

12 MR. BULLOCK: Louis Bullock for the State of Oklahoma.

13 MR. RIGGS: David Riggs for the State of Oklahoma.

14 MR. NANCE: Robert Nance for the State of Oklahoma.

15 MS. BURCH: Kelly Burch for the State of Oklahoma.

16 MR. GARREN: Richard Garren, the State of Oklahoma.

17 MR. HAMMONS: Trevor Hammons for the State of
18 Oklahoma.

19 MR. GEORGE: Robert George appearing for the four
20 named Tyson Defendants.

21 MR. BOND: Michael Bond appearing for the four named
22 Tyson defendants.

23 MR. MCDANIEL: Scott McDaniel for Peterson Farms.

24 MR. REDEMANN: Robert Redemann for the Cal-Main
25 defendants.

1 not only for its analysis but also for the fact that in that
2 case Judge Eagan stayed not the state statutory claims, but
3 common law claims. The claim that was stayed was a nuisance
4 claim. And so Holder, among other things, stands for the
5 proposition that where the primary jurisdiction factors mandate
6 deference to the administrative agency, this Court should stay
7 not only the statutory claims but the common law claims.

8 THE COURT: Well, and yet in Holder, if I'm not
9 incorrect, I mean she recognized the old 1915 case of DuPont --

10 MR. GEORGE: Correct.

11 THE COURT: -- that distinguished between the English
12 rule and the American rule, which seems to make a whole lot of
13 sense, that the Oklahoma Supreme Court in that 1915 case
14 rejected the English rule denying monetary damages for common
15 law claims when an alleged nuisance has been authorized by the
16 legislature, saying in the United States there are
17 constitutional boundaries. Right?

18 MR. GEORGE: Right. Absolutely.

19 THE COURT: So even though she found EPA had primary
20 jurisdiction, she recognized the continuing authority of the
21 DuPont case.

22 MR. GEORGE: Correct. But the importance of that
23 analysis under the rubric of DuPont, Your Honor, is that
24 notwithstanding the point that you just made with respect to
25 injunctive relief under common law claims, DuPont and Holder,

1 and I'll submit to you every Oklahoma case that's been cited by
2 any of the parties in this case, stands for the proposition
3 that Oklahoma has recognized that the court lacks the authority
4 to enjoin a legalized nuisance. So notwithstanding the fact
5 that there might still be some balance recovery of damages
6 under a common law claim despite some authorization by either
7 statute or an administrative agency, with respect to whether
8 the power exists to enjoin conduct that has been authorized by
9 statute or administrative agency, the cases are clear courts
10 lack that authority. And in fact, Your Honor, that's the third
11 argument that is presented in our motion and it's based on the
12 DuPont case as well as the City of Bartlesville case, it stands
13 for the same proposition, as well as that Title 50, Section 4
14 of the Oklahoma Statutes which says very explicitly "Nothing
15 which is done or maintained under the express authority of
16 statute can be deemed a nuisance."

17 THE COURT: But as you appear to admit, I mean that
18 argument goes primarily to remedy --

19 MR. GEORGE: Correct.

20 THE COURT: -- as opposed to dismissal of the claim
21 and cause of action itself.

22 MR. GEORGE: That's correct. I would submit that Your
23 Honor has the authority to dismiss a claim in part with respect
24 to the remedy. For example, I believe the Court has the
25 authority and in fact should dismiss the claim for an

1 injunction under their nuisance count.

2 THE COURT: I understand.

3 MR. GEORGE: Because of the statutory program that we
4 have just spent some time discussing, that very clearly the
5 Oklahoma legislature has permitted under statutory authority
6 the land application of poultry litter. And so that is a
7 legalized nuisance to the extent it is a nuisance. And Title
8 50, Section 4, as well as the DuPont case and the City of
9 Bartlesville case all would suggest, in fact mandate that an
10 injunctive relief claim brought under a nuisance count be
11 dismissed in those instances.

12 THE COURT: All right. But your primary jurisdiction
13 argument doesn't go to the common law claims anyway.

14 MR. GEORGE: I think it is extended by Holder in the
15 sense that Judge Eagan in Holder applied primary jurisdiction
16 to the common law claim of nuisance. So absolutely. Now where
17 all of this ties together, in my view, is that Judge Eagan's
18 decision in Holder was directly limited to a claim for
19 injunctive relief under a common law claim.

20 THE COURT: Right.

21 MR. GEORGE: So I still think you have -- you have
22 some flexibility there in regard to injunctive relief versus
23 monetary claims, but the principle outlined under all three of
24 these doctrines is the same, and that is that injunctive relief
25 claims whether they are pursued through statutory means or

1 through common law claims cannot be applied against conduct
2 that has been legalized. And that's what all of those cases
3 stand for.

4 Just to review to show the consistency, Your Honor, I
5 want to review just for a moment the DuPont case and the City
6 of Bartlesville case because I think the parallels are quite
7 striking. It had been some time since I had read DuPont and I
8 had to remind myself of the facts, but in DuPont you had a
9 defendant who operated a powder house where explosives were
10 maintained and the plaintiff in that case who was a neighbor
11 was understandably a little upset about the idea of a powder
12 house being located beside him. And so he sued for an
13 injunction, that the court enjoin the operation of the powder
14 house. And there was an earlier version of Title 50, Section 4
15 that back in 1915 was codified as Section 6968 that's discussed
16 in that, but the language is the same. That was an issue and
17 was raised by the defendant. And the court found that, I'm
18 sorry, actually the statutory reference is 4253. The Court
19 found that another statute, Section 6986 authorized the
20 operation of powder houses. And in fact under that statute the
21 state had undertaken to regulate the business of powder houses.
22 The statute required in that instance that the owner and
23 operator of a powder house register with the Oklahoma
24 Department of Mines. Well, there's a registration component
25 obviously with respect to the poultry farmers involved in this

1 particular statute have specifically found that the common law
2 remains in force and effect unless it is explicitly provided to
3 the contrary in a statute. And there is nothing in the Poultry
4 Act or the CAFO Act that evidences any intent whatsoever to
5 preempt common law. In fact, common law is a very integral
6 part of our state's comprehensive environment scheme.

7 And as you've heard discussed in another context,
8 Title 27A:2-6-105 which is the Environmental Quality Code
9 specifically provides that it's unlawful to cause pollution and
10 to place waste in a location that it's likely to cause
11 pollution and it declares such pollution or placement of waste
12 to be a public nuisance. Thus, under our state statute, as
13 well as under common law, it's illegal to cause pollution and
14 create public nuisances. It's always been that way and it
15 remains that way today. So...

16 THE COURT: Well, let's read that argument contained
17 on page 3, I guess in what appears to be the light in which it
18 was intended. They are arguing here that they don't contend
19 that the common law claims were abolished. They say rather,
20 they merely contended that because these legislative enactments
21 expressly authorized the conduct at issue, land application of
22 poultry litter, such conduct cannot be declared unlawful. And
23 I'm reading that I guess in the context of Mr. George's
24 argument, that they're saying, well, you can't enjoin the
25 application. They are not saying that the claim itself is not

1 actionable, they are simply, I think, carving out the remedy of
2 injunction.

3 MS. BURCH: That's the way I take it, too, although
4 it's not very clear from the way that their briefs are written
5 because it talks about preclusion or preemption of common law
6 and so that's why, that's why I want to emphasize it to the
7 Court, that if what we're talking about is whether Title 50,
8 Section 4 applies in this instance, and i.e. whether the
9 defendants are legally authorized to conduct an activity which
10 is the subject of this lawsuit and therefore legally authorized
11 to create a nuisance, that's a completely different issue in my
12 mind from whether or not there has been preemption or
13 preclusion of common law rights and remedies.

14 THE COURT: Also in the context of dismissal actions
15 people like to view things as black or white. It also doesn't
16 discuss the issue of authorized levels of application versus
17 whether or not injunctive relief might be appropriate with
18 regard to over-application.

19 MS. BURCH: Right.

20 THE COURT: All right.

21 MS. BURCH: Right. And another important point about
22 Title 50, Section 4 is that it's just talking about nuisances.
23 It says, "Nothing which is done or maintained under the express
24 authority of a statute can be deemed a nuisance." Yet the
25 defendants appear to be relaying on that for their argument